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In The

Supreme Court of the United States

October Term, 1995

CHRIS R. PLOTT,

Petitioner,

vs.

GENERAL MOTORS CORPORATION, PACKARD ELECTRIC DIVISION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED FOR REVIEW

Whether, for purposes of the Title VII "immunity" defense provided in 42 U.S.C.§2000e-12(b)(1), an EEOC Conciliation Agreement employer makes a good faith attempt to comply with that Agreement's affirmative action percentage goals, for the advancement of its minority and female employees, where its action is designed to and does advance double that goal in female employees.

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No. _____

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Electronic Citation: 1995 FED App. 0368P (6th Cir.)
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JURISDICTION

The Sixth Circuit Court of Appeals' Opinion and Order was entered December 20, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1); and the timeliness of Petitioner's filing is governed by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

42 U.S.C.§2000e-2(a) states:

"Employer practices
It shall be unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C.§2000e-2(d) states:

"Training programs
It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

But 42 U.S.C.§2000e-12(b)(1) provides:

"In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, . . ."

STATEMENT OF THE CASE

This is a Title VII reverse discrimination action that was dismissed on summary judgment. That dismissal was affirmed on appeal. Petitioner now seeks plenary, certiorari review by this Court.

In 1983, after conducting an investigation of Respondent, GENERAL MOTORS' ("GM") employment practices, the Equal Employment Opportunity Commission ("EEOC"), GM and an employee union entered into a Conciliation Agreement that provided a variety of remedial employment goals. Among those goals was a stipulation that GM "make good faith efforts to assure that minorities are at least 15.5% of those chosen for apprenticeship openings, and women are at least 12.0%." Further, GM would "provide pre-apprentice training for minorities and women at selected facilities where openings are anticipated in the foreseeable future."

In 1984, EEOC provided GM with the following "opinion," qualified under section 713(b) of Title VII, 42 U.S.C.§2000e-12(b):

> ". . . it is the opinion of the Commission that any action or omission of General Motors Corporation . . ., or any of [its] officers, agents or employees, that is or shall be taken in a good faith attempt to comply with

> the affirmative action or other provisions of the Conciliation Agreement . . . will not constitute a violation of any of the provisions of Title VII."

In 1987, the Petitioner, an unskilled white male employee at GM's Packard Electric Division, successfully tested for admission into the skilled trades apprentice program. However, he was not admitted to the program because the group of successful applicants did not contain the percentage numbers of minorities and females stipulated in the Agreement.[1] As a result, GM revised the test and retested all applicants. Petitioner again successfully tested for admission but, again, the revised test results did not produce the stipulated percentages of minorities and females.

GM then decided to implement a "pre-apprentice training" program designed to increase the numbers of the minorities and females for the apprenticeship openings. All twenty-three (23) minorities and female applicants were alone provided that training, on the completion of which they were permitted to take a pre-apprentice training exam and retake the revised test, for the purpose of increasing their previous scores.

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[1] I.e., six (6) minorities, and five (5) females for the forty (40) available apprenticeship openings.

When GM invited those twenty-three (23) trainees, it expected twenty (20) of their number to advance to the openings after pre-apprentice training. In fact, seventeen (17) trainees so advanced, six (6) minorities and eleven (11) females, after their new scores were integrated into the list of previous, white male applicant scores. GM then admitted all seventeen (17) trainees to the revised, top forty (40) openings. As a result, Petitioner was displaced by some of the new scores and no longer qualified for an apprenticeship.

Under 42 U.S.C.§2000e-2(a) and (d), Petitioner brought and maintained this action to remedy GM's unlawful, discriminatory employment practice in *substantially* exceeding the Conciliation Agreement's percentage goals for its female employees, through the pre-apprentice training program, as so implemented. Among GM's defenses, the Sixth Circuit Court of Appeals found its 42 U.S.C.§2000e-12(b)(1) "immunity" defense to be dispositive, adding that GM's decision to advance all eleven (11) female trainees "did *not* result in a significant deviation from the Agreement's goals and is well within the terms of the Agreement." (Emphasis added)

ARGUMENT

The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.

This case presents the opportunity to better define the "line of demarcation, between permissible and impermissible affirmative action plans," drawn in *Steelworkers of America v. Weber*, 443 U.S. 193, 208, 61 L.Ed.2d 480, 492 (1979).

The two Title VII cases present a number of similarities:

(1) In *Weber*, supra, management and labor negotiated the voluntary affirmative action plan percentage goal contained in the master collective bargaining agreement. Here, the Conciliation Agreement's percentage goals, to have been met through the "pre-apprentice training" program, resulted from the negotiated efforts of management, labor and the EEOC;

(2) Both agreements provided minimum "percentage" goals for the advancement of protected class(es) members. In *Weber*, ". . . at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of

blacks in the local labor force." Here, Respondent was to have made "good faith efforts to assure that minorities are at least 15.5% of those chosen for apprenticeship openings, and women are at least 12.0%;" and

(3) Neither *Weber*'s plan nor Respondent's program required the discharge of white workers and their replacement with new black [and female] hirees; created an absolute bar to the advancement of white [male] employees; or was anything other than a temporary measure, not intended to maintain racial [gender] balance, but simply to eliminate a manifest racial imbalance [settle claims of racial and gender discriminatory employment practices].

In one significant respect, however, the cases part company. In *Weber*, the affirmative action plan's implementation strictly tracked the bargaining agreement's "at least 50%" goal, i.e., of the thirteen (13) craft trainees selected, seven (7) were black and six (6) white. Here, while the Conciliation Agreement stipulates to "at least 12.0%" females to be chosen for apprenticeship, Respondent actually chose eleven (11) females, i.e., 27.5% of the forty (40) available openings, through its "pre-apprentice training" program.

The question is at hand: For Title VII's "good faith attempt" immunity purposes, and with a Conciliation Agreement's percentage goals qualified

by the adjective, "at least," is there no demarcation line to be drawn between the permissible and impermissible implementation of such an affirmative action plan? Below, at p. 7 of its Opinion, the intermediate appellate court suggested, but avoided drawing that line:

> "Alternatively, as Plott suggests, GM could have admitted the minimum number of women necessary to satisfy the Agreement's goals, by selecting only the top five women. However, the Agreement clearly allowed GM to exceed the percentage target; it required 'at least 12.0%' women and stated that '[t]he goals contained in this Agreement are not intended to operate as a quota or ceiling upon the employment of minorities or women.' It also noted that '[a]ttainment of these goals is predicated on the assumption that some facilities will meet the goals, some facilities will exceed the goals, and some facilities will not meet the goals.'[2] Trimming the number of females to five from

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[2] Despite the stated "assumption," the record is devoid of any evidence of "pre-apprentice" training at any other of Respondent's facilities. Indeed and supra, "... this was the first time the program was offered, ..."

> the group of eleven who qualified after participating in pre-apprentice training not only was not required by the Agreement but also would detract from achieving the purpose of the pre-apprentice training program and the Agreement itself. In short, anything *less* than 12% would have violated the Agreement's terms, but GM could admit *more* than 12% women and still be in compliance. GM decided to award apprenticeships to each of the eleven women whose participation in the training program--a program specifically designed to foster the skills an apprentice would need--had earned her a place among the top forty candidates. Such a decision did not result in a *significant deviation from the Agreement's goals* and is well within the terms of the Agreement." (Emphasis added.)

Concluding, is there *any* such line to be drawn where the percentage goal qualifier, "at least," is, literally, no qualifier at all? Does "at least" mean no "significant deviation from" a particular percentage goal, as the Court of Appeals would imply; and, if so, where is that "significant deviation" line to be drawn? Or, not unlike *Weber*'s implementation, supra, does "at least" really mean meeting or, in case of a fraction, rounding to the next protected class(es) member, in exceeding the percentage goal?

CONCLUSION

Due to the importance of the question presented, supra, and its ready invitation to develop the ratio decidendi of *Weber*, supra, in America's workplace, the Petition should be GRANTED for merits review.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 20, 1995)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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No. 94-3952

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRIS R. PLOTT,
Plaintiff-Appellant,
v.
GENERAL MOTORS CORPORATION
PACKARD ELECTRIC DIVISION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: KENNEDY and MOORE, Circuit Judges; JOHNSTONE, Senior District Judge.*

KAREN NELSON MOORE, Circuit Judge. Plaintiff appeals a summary judgment dismissing his Title VII reverse discrimination suit against defendant General Motors Corporation ("GM"). We affirm for the reasons that follow.

I.

A.

In 1983, after a national investigation of GM's employment practices by the Equal Employment Opportunity Commission (the "EEOC"), GM and the EEOC entered into a Conciliation Agreement (the "Agreement") covering GM facilities nationwide. Although GM denied all allegations of discrimination, the Agreement set various remedial employment goals. The provision relevant to this case required GM to "make good faith efforts to assure that . . . minorities are at least 15.5% of those chosen for apprenticeship openings, and women are at least 12.0%." In addition, the Agreement directed GM to "provide pre-apprentice training for minorities and

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* The Honorable Edward H. Johnstone, Senior United States District Judge for the Western District of Kentucky, sitting by designation.

women at selected facilities where openings are anticipated in the foreseeable future."

In 1987, Chris R. Plott, an unskilled white male employee at GM's Packard Electric Division, successfully tested for admission into a skilled trades apprentice program at GM. However, Plott was not admitted into the program because the group of successful applicants for the forty available apprenticeships did not contain the percentage of women and minorities required under the Agreement. To remedy this problem and purge the selection process of any discriminatory impact, GM revised the test and offered the revised version to applicants. Plott again had one of the top forty scores, but the group once more failed to include the requisite percentage of women and minorities.

GM therefore decided to institute a pilot two-week pre-apprentice training program designed to develop the skills necessary to qualify for an apprenticeship. Any woman or minority who had come within twelve points of the score needed to qualify on the revised test was invited to participate in the program. At the end of the training, the trainee took a pre-apprentice training exam, a high score on which entitled the trainee to a seven-point increase in his or her score on the revised apprenticeship test. In addition, each trainee was allowed to retake the revised test; GM anticipated

that a second try would result in a five-point increase over the trainee's previous score.

After the women and minorities had completed the training program and retaken the revised test, their new scores were integrated into the list of scores that Plott and other white male applicants had previously achieved. The result was that the number of minorities in the top forty exactly equaled the percentage needed under the Agreement, and the number of women exceeded the requisite percentage. GM then admitted everyone in the new top forty. Plott was displaced by some of the new scores and no longer qualified for an apprenticeship.

B.

After meeting the procedure requirements for a Title VII claim and receiving a right-to-sue letter from the EEOC, Plott filed suit in federal district court. The district judge awarded GM judgment on the pleadings, but this court reversed, finding that Plott should have been allowed to file an amended complaint. *See Plott v. General Motors Corp., Packard Elec. Div.*, No. 92-3166 (6th Cir. March 5, 1993) (unpublished disposition). On remand, Plott's second amended complaint alleged two violations of section 703 of Title VII, 42 U.S.C.§2000e-2. First, Plott claimed that because a particular provision of the Conciliation Agreement was facially discriminatory, the adoption of the Agreement was

itself an illegal act. Second, he alleged that GM violated Title VII by exceeding the Agreement's terms in its implementation of the pre-apprentice training program. He sought monetary relief of $100,000 and attorney fees.

The district court granted GM's motion for summary judgment. Plott appeals the summary judgment and also appeals the district judge's refusal to allow additional discovery.

II.

We review grants of summary judgment de novo, viewing all facts and inferences drawn therefrom in the light most favorable to the appellant. *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). Reversal is warranted if the appellant can demonstrate the existence of a genuine issue of material fact. *Id.*

A.

Plott first claims that the actual adoption of the Agreement violated Title VII. In order to show that the adoption of an EEOC conciliation agreement was an independent act of discrimination, a party must demonstrate that the agreement constitutes a bad faith attempt to bestow unequal employment benefits. *See EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1238 (6th Cir. 1980); *see also Mercantel*

v. State of La., Dep't of Transp. and Dev., 37 F.3d 197, 200-202 (5th Cir. 1994) (following *McCall*); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 624-25 (10th Cir. 1987) (same). In support of his claim, Plott points to the provision that instructs GM to "make good faith efforts to assure that . . . minorities are at least 15.5% of those chose for apprenticeship openings and women are at least 12.0%." He argues that this provision represents a bad faith attempt to bestow unequal benefits because the inclusion of the phrase "at least" technically allows the plan to produce an apprentice class composed entirely of women and minorities.

No evidence in this case shows that GM joined in adopting this provision in order to provide unequal employment benefits to women and minorities. Moreover, the "at least" language, standing alone, does not evidence such an intent. In fact, the first Supreme Court case on affirmative action under Title VII approved a plan that contained similar language. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 224 n.3 (1979) (Rehnquist, J., dissenting) (noting that plan provided that "*at a minimum, not less than* one minority employee will [qualify] for every non-minority" (emphasis added)). Aside from his reading of this clause, Plott has offered no basis for his allegation that the Agreement was adopted in bad faith to provide unequal benefits. Summary judgment on this point was therefore correct.

B.

Plott next contends that GM's affirmative action program was unlawfully discriminatory because it exceeded the Conciliation Agreement's goals. To support this argument, he points to the fact that GM admitted an apprentice class that was 27.5% female even though the Agreement only required 12%. Had GM not overshot the Agreement's goals with respect to females, Plott argues, he would have secured an apprenticeship. Plott admits that GM did not exceed the Agreement's goals with respect to minorities, and therefore does not allege race discrimination in the implementation of the Agreement.

The proper inquiry is whether GM's pre-apprentice training program constituted a good faith attempt to comply with the Agreement's affirmative action provisions, not whether there were more women actually admitted to the apprentice program than the minimum number required under the Agreement. Pursuant to section 713(b) of Title VII, 42 U.S.C.§2000e-12(b),

> [i]n any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained

> of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] . . . . Such a defense, if established, shall be a bar to the action . . . .

This section insulates employers from liability for decisions made in reliance on an EEOC opinion.

In the year following the adoption of the Conciliation Agreement, the EEOC sent GM a letter stating that

> [it] is the opinion of the Commission that any action or omission of General Motors Corporation . . ., or any of [its] officers, agents or employees, that is or shall be taken in a good faith attempt to comply with the affirmative action or other provisions of the Conciliation Agreement . . . will not constitute a violation of any of the provisions of Title VII.

The letter met all the requirements of 29 C.F.R.§1601.93 (1995) and therefore qualified as an EEOC opinion under section 713(b). Consequently, as long as GM acted in good faith in attempting to comply with the Agreement, it did not violate Title VII. *See Albemarle Paper Co. v. Moody*, 422 U S. 405, 423 n.17 (1975) (noting that good

faith reliance on EEOC opinion conveys complete immunity in Title VII actions).

In this case there is no evidence to suggest that GM acted in bad faith. In fact, Plott admitted in his deposition that he believed that the program was a good faith attempt to meet the Agreement's goals. Indeed, it is difficult to see what stage of GM's decisionmaking process could be attacked as lacking in good faith. When GM first administered its apprenticeship test, the top forty candidates did not include enough women and minorities to satisfy the Agreement's goals; only three women and no minorities were included in the top forty. GM therefore revised the test to purge it of any discriminatory impact. The revised test, however, again produced a class with insufficient percentages. GM then followed the Agreement's explicit instruction to institute pre-apprentice training, and solicited only those female and minority candidates whose scores had been close enough to the top forty that the training program could reasonably be expected to develop the skills necessary for them to secure and succeed in an apprenticeship.

The pre-apprentice training program was a success. After the program, eleven women qualified as apprentices. In retrospect, it could be argued that GM might have invited fewer women to participate in the training, in order to meet the exact minimum

number in the Conciliation Agreement of five females. However, this was the first time the program was offered, and GM had no way of knowing how successful it would be or how many participants would ultimately qualify. Alternatively, as Plott suggests, GM could have admitted the minimum number of women necessary to satisfy the Agreement's goals, by selecting only the top five women. However, the Agreement clearly allowed GM to exceed the percentage target; it required "at least 12.0%" women and stated that "[t]he goals contained in this Agreement are not intended to operate as a quota or ceiling upon the employment of minorities or women." It also noted that "[a]ttainment of these goals is predicated on the assumption that some facilities will meet the goals, some facilities will exceed the goals, and some facilities will not meet the goals." Trimming the number of females to five from the group of eleven who qualified after participating in pre-apprentice training not only was not required by the Agreement but also would detract from achieving the purpose of the pre-apprentice training program and the Agreement itself.

In short, anything *less* than 12% would have violated the Agreement's terms, but GM could admit *more* than 12% women and still be in compliance. GM decided to award apprenticeships to each of the eleven women whose participation in the training program--a program specifically designed to foster the skills an apprentice would need--had earned her

a place among the top forty candidates. Such a decision did not result in a significant deviation from the Agreement's goals and is well within the terms of the Agreement.

Here, as the district court noted, the Agreement was reached to remedy under-representation of women and minorities. It does not take away seniority rights of white male employees, does not require replacement of white male employees, and does not prevent white male employees from participating in the apprenticeship program. *See Johnson v. Transportation Agency,* 480 U.S. 616, 638 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979). Under these circumstances, then, there is no genuine issue of fact material to a claim of bad faith. In fact, GM's conduct appears to be a reasonable attempt to comply with the terms of a federally approved affirmative action plan. The district court properly granted defendant summary judgment.

III.

The final issue is whether the district court's refusal to allow Plott additional discovery is reversible error. Plott filed a motion for additional discovery and also submitted an affidavit under Federal Rule of Civil Procedure 56(f), requesting more time to learn the details of a local GM

affirmative action plan and to obtain a list of the names of those who secured apprenticeships.

A.

Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 257 (1986) (stressing importance of allowing ample time for discovery); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 326 (1986) (same). Parties who suffer an adverse summary judgment may base their appeals on the lack of opportunity to discover evidence necessary to establish a genuine issue of material fact. Generally, however, we decline to review a claim that is presented for the first time on appeal. *See Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243-44 (6th Cir. 1991); *see also Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993) (considering whether district court had opportunity to rule on issue being appealed), *cert. denied*, 115 S. Ct. 56 (1994); *Young v. Langley*, 793 F.2d 792, 794 (6th Cir.) (same), *cert. denied*, 479 U.S. 950 (1986). In the discovery context, before seeking appellate review the parties normally should have given the district court a chance to address their need for further discovery prior to summary judgment.

In practice, this means that appeals alleging inadequate opportunity for discovery come in two distinct forms after adverse summary judgment. The first consists of a challenge to a particular adverse discovery ruling, such as a denial of a motion to extend the discovery period. *See, e.g. Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994) (denial of motion to conduct additional discovery after cut-off date), *cert. denied*, 115 S. Ct. 2000 (1995); *Woods v. McGuire*, 954 F.2d 388, 391 (6th Cir. 1992) (denial of request for additional discovery time); *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 892-894 (6th Cir. 1991) (denial of request to depose witnesses); *Criss v. City of Kent*, 867 F.2d 259, 261 (6th Cir. 1988) (denial of request to depose witnesses); *see also Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1534-35 (6th Cir. 1983) (reversing summary judgment because district court failed to rule on motion to extend time for discovery).

The second type of appeal is a more general claim that the district court acted prematurely by granting summary judgment before discovery was complete. In these cases, the district court did not refuse to allow requested discovery; the only adverse ruling on which the appellant can base its appeal is the summary judgment itself. Under these circumstances, in order to preserve the argument that the grant of summary judgment was too hasty and precluded necessary discovery, the appellant

must have complied with the strictures of Federal Rule of Civil Procedure 56(f), under which the district court may defer summary judgment, pending discovery, if the non-movant submits affidavits stating that "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." *See, e.g., White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994) (reversing summary judgment in light of appellant's Rule 56(f) affidavit); *Glen Eden Hosp., Inc. v. Blue Cross and Blue Shield of Mich., Inc.*, 740 F.2d 423, 428 (6th Cir. 1984) (holding that summary judgment was premature given opposing party's Rule 56(f) affidavit). In other words, if the appellant has not filed either a Rule 56(f) affidavit or a motion that gives the district court a chance to rule on the need for additional discovery, this court will not normally address whether there was adequate time for discovery. *See Klepper v. First Am. Bank*, 916 F.2d 337, 343 (6th Cir. 1990) (affirming grant of summary judgment despite insufficient discovery opportunity where appellant never filed Rule 56 (f) affidavit); *Emmons v. McLaughlin*, 874 F.2d 351, 356-57 (6th Cir. 1989) (affirming summary judgment due to lack of adequate Rule 56(f) affidavit); *Shavmoch v. Clark Oil and Refining Corp.*, 726 F.2d 291, 294 (6th Cir. 1984) (holding that, absent Rule 56(f) affidavit, the district court was entitled to rule on a summary judgment motion at any time).

Regardless of which form the appeal takes, this court has generally applied the abuse of discretion standard, although the case law reveals several different permutations of this standard. *Compare, e.g., Bush v. Rauch*, 38 F.3d 842, 849 (6th Cir. 1994) ("abuse of discretion"); *Woods*, 954 F.2d at 391 (same); *Emmons*, 874 F.2d at 359 (same); *Glen Eden*, 740 F.2d at 428 (same), *with Criss*, 867 F.2d at 261 ("clearly an abuse of discretion), *with Wayne*, 36 F.3d at 530 ("'abuse of discretion resulting in substantial prejudice'" (quoting *Elvis*, 936 F.2d at 893)). A number of different factors are applicable to such claims, such as (1) when the appellant learned of the issue that is the subject of the desired discovery, *see Woods*, 954 F.2d at 391; (2) whether the desired discovery would have changed the ruling below, *see Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 138 (6th Cir. 1993); *Elvis*, 936 F.2d at 894; *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992); *Shavmoch*, 726 F.2d at 294; (3) how long the discovery period had lasted, *see Woods*, 954 F.2d at 391; *Emmons*, 874 F.2d at 359 n.8; (4) whether the appellant was dilatory in its discovery efforts, *see Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993); *McTighe v. Mechanics Educ. Soc'y of Am., Local 19*, 772 F.2d 210, 213 (6th Cir. 1985); and (5) whether the appellee was responsive to discovery requests, *see Tarleton*, 717 F.2d at 1534-35; *Glen Eden*, 740 F.2d at 428.

B.

Applying these various factors to this case, we conclude that the district court did not abuse its discretion in denying Plott's motion for additional discovery and refusing to defer summary judgment under Rule 56(f). First, Plott was dilatory in his efforts to secure the information on which he bases his claim. He first learned of a local affirmative action plan at least three weeks before the end of the discovery period, but did not request any information during the remaining time. His need to know the names of those who had secured apprenticeships became apparent even earlier in the discovery process. Second, even if Plott had received the materials he wanted, this case's outcome would be the same. Section 713(b) of Title VII grants GM immunity for the employment decisions at the core of this litigation, and the additional information Plott sought was irrelevant to section 713(b)'s application.

In fact, the only evidence in the record that supports Plott's claim is that GM was not cooperative during discovery. Under different circumstances, such uncooperative behavior might merit reversal. In this case, however, even the most forthcoming responses would not have changed the ultimate result. Therefore, in the context of review for abuse of discretion, the district court's discovery rulings do not constitute reversible error.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed August 11, 1994)

Case No. 88-CV-3708-Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRIS R. PLOTT,
Plaintiff,

v.

GENERAL MOTORS CORPORATION, et al.,
Defendants.

MEMORANDUM AND ORDER

According to the second amended complaint, the Plaintiff, a white male, was employed by defendant, General Motors Corporation, as an unskilled worker. In October 1983, the defendant entered into a Conciliation Agreement with the Equal Employment Opportunity Commission (EEOC) providing for an affirmative action plan that gave preference to minority and female employees, over

white male employees, in admission to its apprenticeship skilled trades program. Plaintiff alleges that the Conciliation Agreement was made in bad faith in that it was an attempt to bestow unequal employment benefits under the guise of remedying discrimination. In January 1987, Plaintiff successfully tested for admission into the program but the test was disregarded because the number of successful minority and female employees was less than stipulated to in the Conciliation Agreement.

After modification, Plaintiff successfully retested for admission into the program but the successful minority and female employees were again below the required amount. As a result, all minority and female employees were given a special course of instruction before taking the test a third time. The number of successful minority and female employees now substantially exceeded the amount required by the Conciliation Agreement, resulting in plaintiff being considered unsuccessful. Plaintiff brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Defendant has filed a motion for summary judgment.

42 U.S.C. §2000e-12(b) provides in pertinent part:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or

> punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. Such a defense, if established, shall be a bar to the action.

On October 31, 1983, General Motors and the EEOC entered into a Conciliatory Agreement to resolve charges of discrimination against the Corporation. The Agreement provided that the Corporation would choose 15.5% minorities and 12% females for apprenticeship openings. It further provided that the goals were not intended as a quota or ceiling upon the employment of minorities or females and that some General Motors facilities would exceed those goals.

After the initial tests and before any Pre-Apprentice Training occurred, Plaintiff's test scores placed him 28th on the list for the electrician apprentice trade and 28th position on the list for the tool and die apprentice trade. Only 10 electrician apprentices were chosen so Plaintiff did not qualify for that class.

General Motors received a letter from the acting General Counsel of the EEOC. The letter stated in part:

This letter is in response to your request of October 31, 1983, is written pursuant to Section 713(b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b), and is an "opinion letter" on behalf of the Equal Employment Opportunity Commission within the meaning of the Commission's Procedural Regulations Section 1601.33. ...

It is the opinion of the Commission that any action or omission of General Motors Corporation ("the Corporation") or the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"), or any of their officers, agents or employees, that is or shall be taken in a good faith attempt to comply with the affirmative action or other provisions of the Conciliation Agreement dated October 31, 1983, between the Commission, the Corporation, and the Union settling the above-numbered case will not constitute a violation of any of the provisions of Title VII.

Terry McDougall, Assistant Director of Labor Relations for the North American Operations stated in his affidavit that he was the person that made the decision to allow General Motors to proceed with the pre-Apprentice Training Program. In making that

decision he relied on that letter believing that he was acting in conformity with the Conciliation Agreement.

There is no indication of bad faith in the record. General Motors acted inn accordance with the Conciliation Agreement which allowed it to exceed the stated goals for the percentage of minorities and females chosen to participate in the apprenticeship programs. In fact, Plaintiff, at his deposition, agreed that General Motors actions were taken in good faith. His affidavit states otherwise, but a factual dispute cannot be created by filing an affidavit that contradicts earlier testimony. *Dotson v. U.S. Postal Service*, 977 F.2d 976, 978 (6th Cir. 1992). Pursuant to 42 U.S.C. §2000e-12(b), defendant had immunity for its conduct taken in good faith. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 423, n. 17, 95 S. Ct. 2362, 2374, 45 L.Ed.2d 280 (1975).

In *Johnson v. Transportation Agency, Santa Clara County*, California, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), a male employee was passed over for promotion in favor of a female employee, even though he had a higher test score. The Court held that the defendant did not violate Title VII by taking an employee's sex into account, as the decision was made pursuant to an affirmative action plan directing that sex be considered to remedy under-representation by women and minorities and it did not necessarily restrain the

rights of male employees or create an absolute bar to their advancement.

In the present case, the plan does not take away any seniority rights of white male employees, does not require discharge or replacement of a male employee by a female or minority employee and does not prevent white male employees from participating in the apprentice training program. Most of the employees selected for the apprentice training program were white males.

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Union and Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement that included an affirmative action plan that required that at least 50% of the openings in the in-plant craft training program be filled by black employees. The result was that the most senior black employees selected had less seniority than white employees who were rejected. The Court held that Title VII's prohibitions against discrimination did not prevent private, voluntary, race-conscious affirmative action plans. *Id.* 99 S.Ct. at 2730.

> [T]he plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new

> black hirees. Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force. *Id.*

The affirmative action plan in the present case satisfies the Weber standard. The General Motors division involved in this case is composed of approximately 45 to 50% minorities and females. All employees were eligible for the apprentice training program. The goals set forth in the Conciliation Agreement were designed to eliminate racial and gender imbalance. The affirmative action plan does not restrain the interests of white males. Therefore, Title VII has not been violated.

Plaintiff argues Defendant appropriately set goals and then inappropriately substantially exceeded those goals. The required number of women was seven. Eleven were chosen for the

apprentice training program. Plaintiff asserts that he should have been admitted to the tool and die program. Assuming that four females that exceeded the required number seven were placed into the tool and die program, Plaintiff would have moved from 38th on the list for 30 to 34.* Even if the number of females selected for that program met the goals set forth in the Conciliation Agreement, Plaintiff would not have qualified. Therefore, Plaintiff's argument fails.

Accordingly, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ George W. White
United States District Judge

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* After the Pre-Apprentice Training Program with new test scores, plaintiff dropped from the 28th position to 38 on the tool and die list.

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated August 11, 1994)

Case No. 88-CV-3708-Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRIS R. PLOTT,
Plaintiff

v.

GENERAL MOTORS CORPORATION, et al.,
Defendants

ORDER

Pursuant to this Court's Memorandum and Order filed contemporaneously with this Order,

IT IS ORDERED that defendants' motion for summary judgment is granted. This case is hereby dismissed.

IT IS SO ORDERED.

/s/ George W. White
United States District Judge